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In the

Supreme Court of the United States

OCTOBER TERM 1968

No. 549

JOHN D. SENCHAL AND GRACE SENCHAL, HUSBAND AND WIFE, AND THELMA HARKREADER,

Appellants,

v.

V. H. CARROLL, TRUSTEE,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners hereby petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit denying petitioners their right to a

trial by jury on legal matters in controversy in a plenary suit arising out of bankruptcy proceedings.

OPINION BELOW

The opinion below is reported at 394 F. 2d 797. It is appended hereto as Appendix "A".

JURISDICTION

The decision sought to be reviewed was made and entered on May 23, 1968. On August 25, 1968, Mr. Justice White of this Court granted an order extending the time for filing petition for writ of certiorari up to and including September 21, 1968. The statutory provision conferring jurisdiction on this court to review the judgment in question is 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED FOR REVIEW

Whether a defendant may be denied a jury trial in action by a bankruptcy trustee to recover alleged fraudulent conveyances by the bankrupt of money and property to the defendants, and where the defendants file a counter claim against the bankrupt for breach of contract.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII, United States Constitution, "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, * * *"

STATEMENT OF THE CASE

The Respondent, on April 29, 1966 filed a complaint in the United States District Court for the Western District of

Oklahoma, seeking to set aside alleged fraudulent transfers under section 67d of the Bankruptcy Act. The complaint alleged that the fraudulent transfers consisted of certain described real estate, personal property, and an amount of money in cash alleged to be in excess of $200,000; that the transfers were made by the bankrupt, Raymond Gestes, to the named defendants, John D. Senchal, his wife, Grace Senchal, and Thelma Harkreader (Raymond Gestes was not made a party defendant). Respondent asked for a recovery of the money and a return of the property. (R. 1-6) On the same date Respondent filed motions for a preliminary injunction and for a temporary restraining order without notice. The latter motion was granted on the same date. The trial judge ordered that Respondent's motion for preliminary injunction be set for hearing on May 6, 1966. (R. 11, 12)

John D. Senchal and wife Grace filed an answer denying the allegations of the complaint and asserting that on or about July 14, 1965, Raymond Gestes, the bankrupt, had conveyed to them the described real estate and personal property for a consideration of $35,000, paid to Gestes and the assumption of an outstanding mortgage against the real estate in the principal amount of $44,100; that the property was purchased in good faith and for a fair consideration. Petitioners denied that Gestes had transferred cash in any amount to them at any time. Petitioners also filed a counterclaim alleging that Gestes at the time of the sale had agreed to construct a race track and a complete paddock

and water line to the paddock; that Gestes had only partially completed the work and the defendants were required to pay a total of $4,240.67 because of Gestes default. (R. 46-47) Thelma Harkreader filed a denial that Gestes had ever transferred to her any of the property described in the complaint or that the bankrupt had transferred to her any money in cash. A written demand for a jury trial was made. (R. 43-44)

The hearing on the preliminary injunction took place May 6 to May 11, 1966. Only the testimony of the three defendants was heard. At the conclusion of the hearing the trial judge made the following remarks:

> "Gentlemen, I want to say this, with all the evidence all in, I have no hesitancy in saying that I am absolutely convinced that this sum $250,000 drawn out of the All American Fence Company in $100 bills by Mr. Gestes over the period of say the last 9 or 10 months has gone to these sisters, and that is the money we have been talking about. They haven't saved this kind on money. *It isn't possible to expect any court to believe that they have saved this kind of money out of the income that they had, and I see this clearly as a giant swindle or an attempt to swindle the creditors of this bankrupt*, and I have no qualms about it at all in saying that this restraining order will be continued in full force and effect, and the defendant, Mrs. Senchal, is ordered to deliver forthwith, immediately to the clerk the $10,000 cash she has, and the restraining order is enlarged to prohibit the sale of these two automobiles that are in the hands of Raymond Gestes." (emphasis supplied) (R. 602, 603; also R. 93, 94).

The Trial Judge then stated that he wanted Mrs. Senchal to bring the $10,000 immediately to the court clerk. When

her trial attorney remarked that he thought that was pretty stringent the court replied:

> "Well, I do too, but this calls for stringent action; in my opinion, it calls for stringent action in this. This Mr. Crow, in my considered opinion, and I have listened carefully, is just what I said earlier — *it is a gigantic swindle or attempt to swindle, and the court has to deal severely when the circumstances call for it.* Now, just hand it to her, and let her count it now to be sure that the $10,000 that was here earlier is still here because I don't want to make her responsible for less than $10,000 * * *" (R. 606; also R. 97). (emphasis supplied)

Thereafter the Trial Court entered an order on May 18, 1966, granting the motion for preliminary injunction on the reasoning that Respondent was in danger of suffering irreparable injury, loss and damage and ordered that Petitioners be restrained from selling or otherwise disposing of the described real and personal property. The order also restrained and enjoined the Stockyard Bank of Oklahoma City from disposing or paying out any fund held by the Bank in the name of John D. Senchal or Grace Senchal or Walter Fry (R. 49, 52).

By letter dated September 2, 1966, the Trial Judge informed the attorneys of record that although it was contemplated that a jury trial would be had, the Judge was of the tentative opinion that the case would normally be tried before the court without a jury. The Judge concluded that in view of the statement of counsel he had no objection to having a jury in an advisory capacity (R. 87). By letter dated September 20, 1966, Petitioners' trial counsel informally requested the Trial Judge to disqualify himself. The Trial

Judge replied by letter dated September 22, 1966 that he had come to the conclusion that he was not disqualified as a matter of fact or as a matter of law because of his remarks made at the conclusion of the first hearing. He also stated that although he had earlier agreed to have a jury hear all the evidence and make advisory findings, since use of a jury in a merely advisory capacity was objected to by Mr. Senchal, he would hear the case without any jury at all. He stated this would "* * * save at least four days of trial time in rehashing the testimony earlier heard" (R. 91, 92). On October 14, 1966 Petitioners' motion to disqualify was filed, supported by an affidavit and certain correspondence and excerpts from the records. The motion also renewed Petitioners' request for a jury trial acting in any capacity. (R. 83) Petitioners' affidavit stated that the Trial Judge possesses and entertains a disqualifying bias and prejudice toward them as evidenced and revealed by his pronouncing judgment on the ultimate and final facts in issue at the preliminary hearing; by his failure to reserve his final judgment on the merits until hearing all of the evidence; by his expressing an opinion of record indicating a closed and inflexible mind against them without hearing their complete defense; by allowing the injection of the criminal record of Raymond H. Gestes to influence his judgment as to the credibility of Petitioners when they were not responsible for Gestes' record; by his expressed inclination to consider the case as a "penitentiary matter"; and by reversing his original decision to utilize a jury at least in an advisory capacity and dispensing with the jury altogether (R. 84, 85).

REASON FOR GRANTING WRIT

The Writ Should Be Granted Because Petitioners Were Denied Their Right To Trial By Jury on Legal Issues in the Controversy.

The Bankruptcy Act, Sec. 42 (c) provides:

> "The right to submit to a jury *matters in controversy* or an alleged offense under this act shall be determined and enjoyed, except as provided by this Act, according to the laws of the United States now in force or such as may be here enacted in relation to trials by jury." (emphasis supplied)

The Act is in line with the Seventh Amendment preserving the right to a jury trial.

Nowhere in the Bankruptcy Act is there a declaration that "matters in controversy" such as an alleged voidable preference of fraudulent conveyance should not be determined by a jury trial. This is a plenary suit involving "matters in controversy" arising out of bankruptcy proceeding." Bankruptcy proceedings are equitable in nature. The plenary suit here involved in an independent action. It comes within the definition of "matters in controversy" under Sec. 42 (c) declaring that the parties are entitled to a jury trial according to the laws of the United States.

This action brought by the trustee involves fact and law issues. Petitioners are entitled to a trial by jury on those fact and law issues.

This Honorable Court in *Schoenthal v. Irving Trust Company*, 287 U.S. 92 (1932) held that a defendant is entitled to a jury trial in a suit brought by a trustee in bankruptcy

to recover an alleged preference. There is no distinction between the right to a jury trial in suits to recover alleged preferences and those to set aside alleged fraudulent transfers. In *Schoenthal*, the trustee brought the suit in equity to recover sums of money from the defendant allegedly paid to them by the bankrupt. The trustee alleged facts that these payments operated as a preference under section 60b of the Bankruptcy Act. The trustee also asserted he had no adequate remedy at law.

In *Schoenthal* the principal question was whether the defendants were entitled to have the suit tried at law before a jury. The Court held that Section 267 of the Judicial Code serves to guard the right of trial by jury preserved by the Seventh Amendment. Section 267 should be liberally construed. In England actions of trover and money had and received were used to recover preferential payments by bankrupts. Such suits constitute no part of the *proceedings in* bankruptcy but concern controversies *arising out* of bankruptcy. (Citing *Taylor v. Voss*, 271 U.S. 176.) This is the precise situation in the case at bar. This is a suit to recover sums of money and property for which Petitioners paid sums of money. This suit is not a part of the proceedings *in* bankruptcy. It is a controversy arising *out* of the bankruptcy. Such proceedings may be brought in the state court as well as in the federal court. The defendant's right to a trial by jury in either state or federal court is clear. *Collett v. Adams*, 249 U.S. 545, 549 (1919). *Schoenthal* declared:

> "* * * and, in the absence of a clear showing that a court of law lacks capacity to give the relief which the

> allegations show plaintiff entitled to, a suit in equity cannot be maintained. * * * The contention that section 267 prohibits the maintenance of this suit in equity is sustained in principle by numerous decisions of this court. And upon the very question here presented the weight of judicial opinion in the lower federal courts and in the state courts is that suits such as this cannot be sustained in equity." (287 U.S. at p. 95)

The erroneous concept that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues was rejected and overruled by *Dairy Queen v. Wood*, 369 U.S. 469 (1962). In *Dairy Queen* the District Court granted a motion to strike the petitioner's demand for a trial by jury on the grounds that the action was either "purely equitable" or if not purely equitable, whatever legal issues that were raised were "incidental" to equitable issues, and, in either case no right to trial by jury existed. The Court reversed the district court, stating:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury — that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues — for our previous decisions make it plain that no such rule may be applied in the federal courts. * * *"

The Court then discussed some of the historical problems of suits involving both law and equity questions and the effect of the federal rules of civil procedure. The Court stated that the federal rules do not purport to change the basic holding of *Scott v. Neely*, 140 U.S. 106 (1891) that the right to trial by jury of legal claims must be preserved. It

was pointed out that Rule 38(a) expressly reaffirmed that constitutional principle declaring: "the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

The Court then proceeded to examine the complaint and answer in *Dairy Queen* and found a number of claims and defenses that were legal rather than equitable. One was the request for a money judgment. The court said that the claim for a money judgment "is a claim wholly legal in its nature however the complaint is construed." The money judgment claim could be construed as an action on a debt allegedly due under a contract or an action for damages based upon a charge of trademark infringement.

The respondents in *Dairy Queen* contended that their money claim was "purely equitable" because their complaint was cast in terms of "accounting" rather than in terms of an action for "debt" or "damages". (The complaint in the case at bar is framed in this manner also and the Court took $10,000 in cash from the defendants. The Trustee still has this $10,000 money judgment.) The Court disposed of this contention by stating:

> "* * * the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit in a cause of action cognizable at law, as this one is, the plaintiffs must be able to show that the 'accounts be-

> tween the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them. In view of the powers given to district court by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. * * *"

The Court then stated that a jury under proper instructions could readily determine the recovery in that case. It pointed out that the legal remedy cannot be characterized as "inadequate" merely because the measure of damages may necessitate a look into petitioners' business records. This principle applies to the case at bar.

The Court also said that its ruling does not interfere with the District Court's power to grant temporary relief pending a final adjudication on the matter. So the fact that in the case at bar, the Trial Judge granted a temporary restraining order and an injunction prior to the trial on the merits, does not in any way mitigate against the defendants' right to a trial by jury.

Dairy Queen also added by way of a footnote that the decision in *Beacon Theatres* (359 U.S. 509) had settled that procedural changes which removed the inadequacies of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases.

The opinion below discusses in some detail this Honorable Courts holdings in *Dairy Queen* and *Beacon Theatres.* The opinion below agrees that these two cases are "signifi-

cant cases concerned with the right to a jury under the Seventh Amendment". But the Court below failed to apply the significant principles laid down in *Dairy Queen* and *Beacon Theatres*. The Court reverted to the old and rejected principles that if the case is "basically an equitable one" a jury trial may be denied. It gives the outmoded reason that only "equity" can afford to give relief.

Petitioners, asking for a jury trial, urged the principles of *Dairy Queen* and *Beacon Theatres* along with *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932). The opinion below does not explain why under the principles of *Dairy Queen* and *Beacon Theatres*, Petitioners are not entitled to a jury trial on the many legal issues involved in the case. The opinion gives lip service to *Dairy Queen* and *Beacon Theatres* and then distinguishes *Schoenthal* on the basis that the action in that case was for a money judgment alone.

In the case at bar there are many legal issues to be passed on by the jury such as: (1) whether the Senchals paid a fair consideration for the real estate; (2) whether Respondent is entitled to a money judgment and if so its amount; (3) whether Raymond Gestes breached the contract of sale by partial failure to build improvements; (4) whether there were fradulent transfers to Petitioners; (5) whether there was actual fraudulent intent on the part of Petitioners; (6) whether the purchase of the real estate was made with money belonging to the purchasers or to the bankrupt. Some of these legal issues have formed the basis for later criminal charges. This is an additional reason to grant Petitioners their right to a jury trial.

CONCLUSION

The judgment and opinion of the Court of Appeals deprive Petitioners of the right to trial by jury as guaranteed by the Seventh Amendment of the Constitution and codified by Sec. 42(c) of the Bankrupcy Act. For this reason this petition for writ of certiorari should be granted.

Respectfully submitted,

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